IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE, DIVISION I
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

STATE OF TENNESSEE	)	
	)	
vs.	)	No. 2005-D-2854
	)	
ARTHUR WAYNE MARCH	)	
and PERRY AVRAM MARCH	)	

DEFENDANT'S MOTION *IN LIMINE* No. 2

Comes now the Defendant, by and through counsel, pursuant to Rules 12(b) and 47 of the Tennessee Rules of Criminal Procedure, and moves the Court for an order prohibiting the State from adducing what purports to be rebuttal evidence during the rebuttal phase of the trial except insofar as such proffered evidence actually tends to explain or controvert evidence adduced by the Defendant.[1] The Defendant respectfully requests a jury out hearing to determine whether proposed rebuttal testimony does or does not constitute appropriate rebuttal.

The accused specifically requests that any proposed rebuttal testimony be subjected,

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[1]"'Rebutting evidence' is that which tends to explain or controvert evidence produced by an adverse party. . . . One cannot rebut a proposition that has not been advanced." *Cozzolino v. State,* 584 S.W.2d 765, 768 (Tenn. 1979). *See also, State v. Coulter,* 67 S.W.3d 3, 66 n.8 (Tenn.Crim.App. 2001) ("Rebuttal proof is any competent evidence which explains or is a direct reply to, or a contradiction of, material evidence introduced by the accused, or which is brought out on his cross-examination.")

prior to being placed before the jury, to analysis for relevance and materiality under Tenn.R.Evid. 401 and 402 and for whether grounds for exclusion under Tenn.R.Evid. 403[2] exits. If and to the extent that proposed rebuttal evidence includes uncharged crimes, wrongs and/or acts of the accused, the Defendant demands strict compliance with the procedural safeguards set forth in Tenn.R.Evid. 404(b) and *State v. Parton,* 694 S.W.2d 299, 303 (Tenn. 1985).

In determining the admissibility of evidence under Rules 401, 402, 403, and 404, the Court must consider, among other things, the questions of fact that the jury will have to consider in determining the accused's guilt as well as other evidence that has been introduced during the course of the trial. *State v. Coulter, supra,* 67 S.W.3d at 48. Evidence of a general criminal propensity should not be admitted if the same is not probative of predisposition to commit the specific inchoate offenses alleged in the indictment.

"Predisposition may be established by evidence of prior crimes of a similar character . . . or by evidence, direct or circumstantial, that the accused was ready and willing to engage in the illegal conduct in question." *State v. Jones,* 598 S.W.2d 209, 220 (Tenn. 1980) [emphasis added]. These qualifiers are important. The predisposition evidence must relate to the relevant propensity. N. Cohen, D. Paine & S. Sheppeard, *Tennessee Law of Evidence,*

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[2]Rule 403 provides that evidence, though relevant, is excludable "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Fourth Ed., § 4.04[20], 4-101 (2000).

"Evidence of prior acts of misconduct is not admissible unless in some way relevant to the crime charged, and where entrapment is in issue evidence of prior crimes is not relevant unless it tends to prove that defendant was engaged in illegal operations in some way similar to those charged in the indictment." *De Jong v. United States*, 381 F.2d 725, 726 (9th Cir. 1967). For example, the Supreme Court of Mississippi held in *Williams v. State*, 761 S.2d 149, 154 (Miss. 2000) that admission of a prior conviction of possession of marijuana was reversible error where the accused had raised an entrapment defense to charges of sale of marijuana.

The Supreme Court of Louisiana in *State v. Batiste*, 363 So.2d 639 (La. 1978), has given guidance as to the circumstances under which, where entrapment has been raised as a defense, evidence of other criminal activity may be admitted to show predisposition to commit the charged crime. "[I]n recognition of the danger that the trier of fact may place undue emphasis on the evidence of other criminal activity and perhaps judge the defendant guilty on the basis of this other evidence, courts have wisely determined that the introduction of such evidence must be controlled in a reasonable manner." *Id.*, at 643. Where the accused raises an entrapment defense, other crimes evidence utilized by the State must be of a similar character of the offense for which the defendant is on trial. Another factor which the trial court should consider in determining whether the evidence

is to be admissible is the remoteness in time of the offenses. Moreover, the trial judge must consider whether, under the circumstances of the case, the evidence, even though relevant, should be excluded because its prejudicial effect outweighs the probative value on the issue of predisposition. *Id.*, at 643.

The Supreme Court of Tennessee has opined that evidence of the defendant's reputation bears upon the issue of predisposition. *State v. Jones, supra,* 598 S.W.2d at 220. This statement, however, did not consider the effect of the Sixth Amendment to the United States Constitution, which guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him", nor that of Article I, § 9 of the Constitution of Tennessee, which guarantees the accused the right "to meet the witnesses face to face."[3] Reputation evidence necessarily involves hearsay.

Since the United States Supreme Court decided *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct.1354, 158 L.Ed.2d 177 (2004), the threshold question in any Confrontation Clause case is whether a challenged out-of-court statement is testimonial or nontestimonial. If it is testimonial, the statement is inadmissible unless (1) the declarant is unavailable and (2) the accused had a prior opportunity to cross-examine the declarant. *Id.* If it is not

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[3]With respect to the right to physically confront one's accusers, the Tennessee Supreme Court has observed that "the 'face to face' language found in the Tennessee Constitution has been held to impose a higher right than that found in the federal constitution." *State v. Maclin,* 183 S.W.3d 335, 343 (Tenn. 2005), quoting *State v. Deuter,* 839 S.W.2d 391, [*344] 395 (Tenn. 1992).

testimonial, then the states are free to apply their own hearsay law to determine the statement's admissibility. *State v. Maclin,* 183 S.W.3d 335, 345 (Tenn. 2005).

If an out-of-court declaration is testimonial in nature, the statement is inadmissible unless two requirements are satisfied: (1) the declarant/witness must be unavailable and (2) the defendant must have had a prior opportunity to cross-examine the declarant/witness. *Maclin,* at 344; *Crawford,* 541 U.S. at 68. If the statement is nontestimonial, the Confrontation Clause analysis does not end. Instead, consistent with *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, the court must determine whether the out-of-court statement bears adequate indicia of reliability--specifically, whether it falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." *Maclin,* at 351.

Some courts have been circumspect in admitting hearsay for the purpose of proving a defendant's predisposition. As Justice Potter Stewart observed in his dissent in *United States v. Russell,* 411 U.S. 423, 443, 93 S.Ct. 1637, 1648, 36 L.Ed.2d 366 (1973):

> a test that makes the entrapment defense depend on whether the defendant had the requisite predisposition permits the introduction into evidence of all kinds of hearsay, suspicion, and rumor -- all of which would be inadmissible in any other context -- in order to prove the defendant's predisposition. It allows the prosecution, in offering such proof, to rely on the defendant's bad reputation or past criminal activities, including even rumored activities of which the prosecution may have insufficient evidence to obtain an indictment, and to present the agent's suspicions as to why they chose to tempt this defendant. This sort of evidence is not

only unreliable, as the hearsay rule recognizes; but it is also highly prejudicial, especially if the matter is submitted to the jury, for, despite instructions to the contrary, the jury may well consider such evidence as probative not simply of the defendant's predisposition, but of his guilt of the offense with which he stands charged.

The instant Defendant respectfully submits that, for the reasons identified in the above quotation from Justice Stewart's dissent in *Russell,* to receive evidence of predisposition based upon "nontestimonial"[4] rank hearsay does not comport with the "indicia of reliability" requirement, and admission thereof moreover would violate Tenn.R.Evid. 403 and constitutional due process guaranties.

The Supreme Court of Alabama has opined that:

> a substantial number of jurisdictions refuse to permit reputation or hearsay evidence to establish predisposition. See *United States v. Richardson,* 764 F.2d 1514 (11th Cir.), *cert. denied,* 474 U.S. 952, 106 S.Ct. 320, 88 L.Ed.2d 303 (1985); *United States v. Hunt,* 749 F.2d 1078 (4th Cir. 1984), *cert. denied,* 472 U.S. 1018, 105 S.Ct. 3479, 87 L.Ed.2d 614 (1985); *United States v. Webster,* 649 F.2d 346 (5th Cir. 1981) (en banc); *United States v. McClain,* 531 F.2d 431 (9th Cir.), *cert. denied,* 429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 101 (1976); *United States v. Ambrose,* 483 F.2d 742 (6th Cir. 1973); *United States v. Johnston,* 426 F.2d 112 (7th Cir. 1970); *United States v. Catanzaro,* 407 F.2d 998 (3d Cir. 1969); *Whiting v. United States,* 296 F.2d 512 (1st Cir. 1961); *Bauer v. State,* 528 So.2d 6 (Fla.Dist.Ct.App. 1988); *Bowser v. State,* 50 Md.App. 363, 439 A.2d 1 (1981); *State v. Jones,* 416 A.2d 676 (R.I. 1980); *Price v. State,* 397 N.E.2d 1043 (Ind.App. 1979); *State v. Cox,* 110 Ariz. 603, 522 P.2d 29 (1974).

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[4]Of course, some types of hearsay, such as official complaints to governmental authorities, statements in response to police interrogation or recitations contained in police reports may be "testimonial" in nature, such that *Crawford* analysis, rather than *Roberts* analysis, would apply.

Lambeth v. State, 562 F.2d 575, 578 (Ala. 1990).

In *United States v. Webster, supra,* statements were made by an informant to a law enforcement officer about specific instances in which the defendant engaged in criminal activities. In overruling its prior precedents, the *en banc* Fifth Circuit Court of Appeals stated:

> "Our creation of a rule that allows gross hearsay evidence to be used to prove predisposition has resulted in the very evils that the rule against hearsay was designed to prevent. The jury is free to believe unsworn, unverified statements of government informants, sometimes unidentified, whose credibility is not subject to effective testing before the jury and whose motivations may be less than honorable. We are hard pressed to envision a situation where the disparity between the probative value and prejudicial effect of evidence is greater. Finding inapplicable the exceptions to the rule against hearsay enumerated in the Federal Rules of Evidence, we hold that hearsay evidence is never admissible for the purpose of proving the defendant's predisposition. All prior decisions of this Court to the contrary are hereby overruled."

649 F.2d at 350 [footnotes omitted].

The above authorities indicate that ruling upon admissibility of what the State may proffer as rebuttal evidence will require careful and deliberate consideration of several tricky evidentiary issues. These kinds of evidentiary determinations are best made in a full blown jury out hearing. No one wants to try this case more than once.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a correct and complete copy of the foregoing has been hand-delivered to the Office of the District Attorney General, 222 Second Avenue North, Nashville, Tennessee 37201, this 31st day of May, 2006.

JOHN E. HERBISON